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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

NO. 756

T. L. CARPENTER and LILLIE V. CARPENTER,
PETITIONERS

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT

BRIEF OF PETITIONERS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

NO. 766

T. L. CARPENTER and LILLIE V. CARPENTER,
PETITIONERS

vs.

A. S. J. SHAW, AS STATE AUDITOR OF THE STATE OF OKLAHOMA, RESPONDENT

BRIEF OF PETITIONERS

Opinion Below, 272 Pac. 393

JURISDICTION

This Court granted Application for Writ of Certiorari on the 15th day of April, 1929.

QUESTIONS PRESENTED

PART 1

The petitioners, T. L. Carpenter and Lillie V. Carpenter, and their assignors, Mattie L. V. Zachary, nee Morris, and Julia A. Morris, are duly enrolled Choctaw Indians of less than one-half blood, and each received an allotment of lands in the State of Oklahoma by virtue of their citizenship in said tribe of Indians. The period of twenty-one years from the date of the issuance of patents, respectively, had

not expired as to any of said allotments at the time of filing this suit, and has not yet expired as to some of them. The allottees still retain title to their respective allotments, from which restrictions have been removed by Act of Congress of May 27th, 1908, 35 Statute 312. By virtue of the statutes and decisions hereinafter set forth such lands are and were non-taxable so long as the title remained in the allottee, not to exceed twenty-one years from the date of the issuance of patents, respectively. Subsequent to the removal of restrictions, said allottees leased their several allotments to various persons and corporations for oil and gas purposes in the usual manner and form, whereby they retained a one-eighth royalty of the oil and gas produced from their several allotments. In 1915, the State of Oklahoma enacted what is commonly known as a gross production tax statute, which was amended in 1916, which levies a tax of three percentum upon the royalty interests of all royalty owners coming within the provisions of the act, which tax is payable quarterly each year; and it is contended by the State Auditor that the petitioners' royalty interests are subject to the payment of said tax. In pursuance of the leases aforesaid, the respective lessees entered upon said lands and developed the same for oil and gas purposes, and are now and were at all times mentioned in the petition filed in this case producing oil and gas therefrom in paying quantities; one-eighth part of which is and was payable to the petitioners and their assignors respectively as a royalty. The State Auditor demanded of petitioners and their assignors the payment of said gross production tax upon their royalty interests, and in order to avoid the issuance of tax warrants, or the stopping of the payment of royalties to them, as authorized by the Oklahoma statute, said parties paid the amount of tax demanded of them to the State Auditor and then commenced an action against him in the District Court of Oklahoma County to recover said tax; upon the ground that the same was illegal and uninforcible as against their royalty interests. The State Auditor demurred to the petition, which was sustained by the trial

court, whereupon an appeal was taken to the Supreme Court of the State by the petitioners, where the judgment of the trial court was affirmed; and the State Supreme Court held, first, that said royalty interests were subject to the payment of said tax, and second, that in no event could the petitioners recover that portion of the tax which was not paid before delinquency. The petitioners contend that the royalty interests involved are not subject to the payment of a gross production tax during the period alleged in the petition, for the reason that the lands involved are exempt from taxation. The petitioners further contend that said tax as applied to their royalty interests during the time involved is utterly void and that the state was powerless to enforce the same and that the provisions of the statute requiring the payment of the tax before delinquency, in order to recover is not applicable in this case.

PART 2

As to the merits of the controversy, the petitioners contend that, inasmuch as the lands involved were admittedly non-taxable during the period involved, that the respective royalty interests are also non-taxable for the reason that a tax upon such royalty interests is in fact a tax upon the land; that the statute by its express provision, and as construed by the Oklahoma Supreme Court, levies a tax upon the mineral rights incident to and inherent in the land, rather than a tax upon the oil after severance; and further, that even should the statute be held to levy a tax upon such minerals after severance, still such tax is invalid and unforcible as to said royalty interests, on the theory that where the principal is immune from taxation, the produce and yields derived therefrom are likewise immune and exempt. The State Auditor contends, that said royalty interests are subject to taxation under said gross production tax statute.

STATUTES

(See Appendix.)

STATEMENT OF THE CASE

As previously stated, petitioners and their assignors are members of the Choctaw Nation or Tribe of Indians, and as such, each received an allotment of lands in severalty, which are still owned by them. Under the provisions of Section 29 of the Act of Congress of June 28th, 1898, ratified August 24th, 1898, commonly known as the Atoka Agreement (30 Statute, 495), said lands were non-taxable as long as title remained in the original allottee, not exceeding twenty-one years from the date of the issuance of patent. Such period had not expired as to either of the allotments involved at the time of the institution of this action, and has not expired yet as to a portion of them. Said allottees leased their several allotments for oil and gas purposes, reserving unto themselves one-eighth of the oil and gas produced as a royalty, and in pursuance thereto, oil and gas have been and are now being produced and saved in paying quantities and the allottees have received and are now receiving the royalties reserved, as aforesaid.

The restrictions on the alienability of their lands having been removed by Act of Congress of May 27th, 1908, 35 Stat. 312, as each of the allottees are of less than one-half Indian blood, the State Auditor claimed the right to levy a tax of three percent of the gross value of the minerals produced upon said allottees' royalty interests. Thereupon, said allottees, in order to avoid the issuance of tax warrants, or the stopping of the payment of royalties accruing to them under order of the State Auditor, paid the taxes demanded under protest; and at the time of the payment served notice upon the State Auditor as required by the Oklahoma statute, that such taxes were being paid under protest and that suit would be instituted for the recovery thereof. This action was commenced within the time and in the manner as required by the Oklahoma statute in the District Court of Oklahoma County to recover said illegal taxes.

Petitioners allege that said royalty interests were exempt from taxation in view of the fact that their several

allotments were non-taxable, and that to attempt to tax such royalty interests was contrary to and in violation of the laws of the United States, as contained in the agreement between the United States and the Choctaw and Chickasaw Nations or Tribe of Indians. They further allege, that in the process of operating said leases and producing oil and gas from said lands that the one-eighth portion of said minerals belonging to the allottees were pumped immediately after the same were produced into the pipe lines and containers of the purchaser of such minerals, where the same were passed through meters to determine the amount of such royalty interest due to said allottees, and that the production and sale of such minerals in effect constituted one transaction.

Petitioners further allege, that as expressly provided by the terms of Section 9814 C. O. L. 1921, and as construed by the Supreme Court of the State of Oklahoma, said tax is not levied upon the minerals after severance from the soil, but is a property tax, the equivalent of an ad valorem tax and in full and in lieu of all taxes by the state, county, city, town, township and school district, upon the minerals produced during the year and upon the rights attached to or inherent in the right to said minerals appertaining to the land; and that said statute as construed by the taxing officials of the State of Oklahoma covers and includes, and is levied and assessed upon the value of the royalty in the remaining minerals which are stored in and under the ground, and that no higher value is placed by the taxing officials of said state for the purpose of general and ad valorem taxes upon lands highly productive of oil and gas than upon similar lands containing no such minerals.

Petitioners further allege, that to apply said tax as to the royalty interests of the several allottees involved in this action violates the uniformity clauses of the Oklahoma Constitution (Section 5 of Article 10, and Section 59 of Article 5), and constitutes the taking of their property without due process of law, and denies to them the equal protection of the law, in violation of the Oklahoma Consti-

tution and the 5th and 14th Amendments to the Constitution of the United States; for the reason that the tax, when applied to other tax payers of the same class whose lands were not exempt from taxation, covers and includes a tax upon the land itself and the minerals stored therein. (R. 1-23.)

The State Auditor filed a demurrer to plaintiffs' petition (R. 24), which was sustained by the trial court. (R. 26.) The petitioners appealed to the Supreme Court of the State, which affirmed the judgment of the trial court and the syllabus of the opinion is as follows:

> "By Section 9971, C. O. S. 1921, the right to maintain an action for the recovery of an illegal tax is conditioned on compliance with all requirements therein contained, one of which is that the amount of taxes assessed shall be paid at the time and in the manner provided by law. Where a petition on its face shows that there has been no compliance with one of the essential requisites, it fails to state a cause of action.
>
> "Oil, when discovered and reduced to possession by being detached from the soil in which it is embedded becomes and is personal property and is subject to state gross production tax.
>
> "By the provisions of the Act of Congress of June 28, 1898, 30 Stats. 495, known as the Atoka Agreement, the allotments of Choctaw and Chickasaw Indians were made to be exempt from taxes so long as title remained in the original allottees, not exceeding 21 years from the date of patent, but said exemption from taxation did not extend to personal property.
>
> "By Act of Congress, May 27, 1908, 35 Stats. 312, restriction from alienation was removed from all lands of allottees of the Five Civilized Tribes enrolled as intermarried whites, freemen, and mixed-

blood Indians having less than one-half Indian blood, including minors, and in consequence thereof appellants were at liberty to execute oil and gas leases to their lands without interference or regulation on the part of a federal government agency. Held oil produced under a royalty interest is subject to the gross production tax of the State of Oklahoma, notwithstanding that the land upon which the oil was produced is exempt from taxation.

"Oil discovered and reduced to possession is personal property and is not exempt from state taxation by the Constitution of the State of Oklahoma.

"The property upon which the tax in question was levied is not exempt from state taxation by the Constitution of the United States, or by an Act of Congress, or treaty with the Indians.

"The gross production tax of the State of Oklahoma, as levied under the facts in the instant case, is not a tax upon a federal instrumentality." 272 Pac. 393. (R. 27-29.)

SUMMARY OF ARGUMENT

PART 1

The petitioners contend that since the several allotments involved were exempt from taxation during the period referred to in plaintiffs' petition that their royalty interests are likewise exempt from taxation; and that the tax now under consideration is a tax upon the land eo nominee, and that such tax is therefore clearly illegal. They further contend that even should it be held that the tax is not levied upon the land, or an interest therein as such, but rather upon the income and produce thereof that nevertheless such tax is illegal under the principle announced by this Court in the case of Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429, 39 L. Ed. 759, and other cases which will be

referred to, holding that a tax upon the produce or income is a tax upon the source of such income.

PART 2

The petitioners further contend that the holding of the Oklahoma Supreme Court, that they cannot recover that portion of the tax which was not paid before delinquency, for the reason that the same was not paid at the time and in the manner as provided by statute, is erroneous and that such rule is not applicable to the petitioners and their assignors for the reason that the tax is utterly void and the state is wholly without power or authority to enforce the same; and that the provisions of the Oklahoma statute requiring the payment before delinquency merely applies to a tax which the state has power to levy, but which may be recovered by virtue of some error or irregularity in the levy and assessment thereof.

ARGUMENT

PART 1

(a) The Statute as Applied to Royalty Owners, Levies a Tax Directly Upon an Interest in the Land, and not Upon the Minerals After Severance.

First, let us consider the state statute under which the tax is attempted to be enforced and the decisions of the Oklahoma Supreme Court, construing the same, to determine the nature of the tax and the property rights upon which the tax is laid.

Section 9814 C. O. L. 1921, after providing that those engaged in the mining or production of certain minerals, including petroleum or other crude oil and natural gas, shall be subject to a gross production tax, and providing for the time and method of the payment as well as the amount of the tax, further provides that:

"* * * * * The owner of any royalty interest shall

pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this act."

Also:

"The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or *such royalty interests as are exempted from taxation under the laws of the United States* and the amount of the tax on the royalty interest shall be a lien on such interest." (Italics ours.)

As to the property of the royalty owner covered by the tax, the statute provides:

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities, upon *any property rights attached to or inherent in the right to said minerals* * * * * *upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land* * * * * and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described." (Italics ours.)

The italicized portion of the statute above quoted clearly applies to the interest of the royalty owner, which is a freehold estate. The rights referred to are those pertaining to the land generally. The lessee has no such right, but has merely a privilege to go upon the land and to explore for, produce and save such minerals, with the right to use so much of the surface as is reasonably necessary for such purposes. In other words, his is more in the nature of an easement. Rich vs. Doneghey, 71 Okla. 204, 177 Pac. 86.

Then applying the above quoted portion of the statute

to the royalty owner, it is clear that the tax is levied upon the mineral rights appertaining to the lands, or his minerals stored therein. The State Auditor contends that the tax is laid wholly upon the minerals as personal property after severance. But if the words "upon any property rights attached to or inherent in the right to said minerals" and "upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land" mean anything, then this contention is untenable.

Our contention is that the statute under consideration levies a tax not only upon the product of the land—the land owners' share in the minerals produced during the tax year, if indeed the value of the minerals produced is to be taken into consideration for any purpose in computing the tax, other than for the purpose of determining the amount of the tax to be paid upon the value of the mineral rights incident to and inherent in the land—but by the clear and explicit terms of the statute itself, the tax covers and includes an interest in the land—the remaining minerals stored therein; which are alleged in the petition to be of far greater value than the oil actually produced and saved during the taxing year. In addition to the provisions above quoted, the statute further provides that:

> "* * * * *any interest in the land other than that herein enumerated, and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.*" (Italics ours.)

The reference "any other interest in the land other than that herein enumerated," clearly shows that the legislature intended that the payment of the gross production tax should cover and include the minerals stored in the lands, which are admittedly a part of the real estate until severed

from the soil; and the surface rights and all other rights other than the mineral rights in said lands are made subject to the payment of an ad valorem tax as though such lands had no value for oil and gas purposes.

Thus it appears that two classes of taxes are provided by this act; first, a gross production tax, computed upon the value of the minerals produced during the year, which is in lieu of an ad valorem tax, but nevertheless a direct tax, upon all of the property mentioned in the statute during the taxable year; and second, an ad valorem tax upon the surface rights of the land and all oil produced and on hand January 1st; the date which other property is declared taxable on that basis. Now suppose plaintiffs did not sell their oil as produced, and let us further suppose that there should be produced and placed in storage to their credit on the 31st day of December, 1000 barrels of oil. Under the State Auditor's theory, they would be compelled to pay a direct tax of 3 percent of the gross value of this oil for *one day* of the year, and then pay an ad valorem tax on the same oil by reason of its ownership the next day. The same inequality would apply, of course, in a lesser degree, depending upon the date of production back over the entire year. Certainly the legislature did not intend any such inequality.

It is alleged in plaintiffs' petition (the truth of which is admitted by the demurrer), that the taxing officials of the State of Oklahoma have uniformly construed said gross production tax statute ever since the date of its adoption, as a tax upon the value of the minerals stored in the land; and that no greater value is placed by them for purposes of general and ad valorem taxes upon lands known to be highly productive of oil and gas than upon lands of equal value for agricultural purposes, but entirely barren of all minerals and mineral substances. The Oklahoma Supreme Court recently held this to be the proper construction of the statute in the case of Kenoyer vs. Board of Equalization of Ottawa County, 130 Okla. 3, 264 Pac. 891, where the Court said that no additional valuation should be placed upon land for general ad valorem tax purposes by reason of the dis-

covery of oil, as the gross production tax covers the added value caused by the discovery of such mineral.

Also, in the case of In Re: Skelton Lead & Zinc Company's Gross Production Tax for 1919, 81 Okla. 134, 197 Pac 495, the State Court in constructing this statute held specifically that the tax is not laid upon the products of the mine. There it is said:

> "The provision in Chapter 39, Sess. Laws Ex. Sess. 1916, for the payment of a sum equal to 1½ per cent of the gross value of lead and zinc products, is merely a means of measure adopted by the legislature for ascertaining the fair cash value of the mills, plants, machinery, equipment, and other property used in the operation thereof, as a going concern."

Also:

> "In deciding this question, we bear in mind that *the tax in question is not levied upon the mine products themselves, but as we interpret the statute, is levied upon the entire property, mills, plants, machinery, equipment, etc., 'as a going concern,' the value of which as a going concern and the reasonableness of the rate upon which is to be ascertained by the gross value of the products.*" (Italics ours.)

> "Chapter 39, ss. 1, Session Laws Ex. Sess. 1916, provides that the mine operator shall make reports showing 'the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, * * * * and shall at the same time pay to the State Auditor a tax (not upon the products themselves, but a tax) equal to one-half of 1 percentum of the gross value' of the mined products.

"The same section provides also that:

> "The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities * * * * upon the machinery, appliances and equipment used in and around any well * * * * and also upon the oil, gas, asphalt or ores * * * * during the tax year in which the same is produced.

"Thus it appears that the sole object of the legislature was to adopt a practicable means for ascertaining the fair cash value of these smelting plants and equipment 'as going concerns,' and to levy a property tax thereon according to such value, and, deeming the gross value of the products therefrom as a fair and practicable measure for ascertaining such value, it adopted such measure and levied a tax which it specifically provided should be 'in full and in lieu of all other taxes,' and which should be no greater nor less than the general ad valorem rate of property tax upon other property within the state, assessed at its fair cash value. And in order to attain this object and to provide adequate means for its attainment, the same act, Chapter 30, Session Laws Ex. Sess. 1916, p. 105, provides that:

> " 'The State Board of Equalization, upon its own initiative, may, and upon complain of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual

> operation of, in and around any such well or mine, the value of the oil, gas, asphalt and other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said board to said Court.'
>
> "From this it is clear that the legislature had no other object than to levy a property tax upon mining property according to its fair cash value, using the measure therein adopted for ascertaining such value, and providing the means therein provided for correcting any mistakes which might result from over valuation or excessive rate. See *Exchange Oil Co.* vs. *State,* (No. 11355), 193 Pac. 999, not yet officially reported."

We therefore find that the statute as thus construed is not against the minerals actually produced during the tax year, but is upon the other property mentioned in the statute, *which in the case of the royalty owner is his royalty interest in the land;* and the tax of 3 percent of the gross value of the minerals produced is only adopted as a means of fixing the value and the amount of the tax which should be levied upon the royalty interest in the land.

The State of Minnesota has a gross production statute very similar to the Oklahoma statute, and this court in Lake Superior Consolidated Iron Mines, et al, vs. Lord, et al, 271 U. S. 577, 70 L. Ed. 1093, in construing the Minnesota statute held that the tax was levied upon the land. We quote from the opinion as follows:

> "By their several bills in the United States District Court, appellants alleged the invalidity of

Chapter 226, Laws of Minnesota, approved April 11, 1923, because of a conflict with the Fourteenth Amendment and the State Constitution. They sought to prevent its enforcement. That court held the enactment valid, and, by decrees entered January 15th, 1925, dismissed the bills. These appeals followed.

"The challenged act (fourteen sections) effective from its passage provides—

Sec. 1. There shall be levied and collected upon all royalty received during the year ending December 31, 1923, and upon all royalty received during each calendar year thereafter, for permission to explore ore from land in this state, a tax of six (6) per cent.

Sec. 2. For all purposes of this Act the word 'royalty' shall be construed to mean the amount in money or value of property received by any person having any right, title or interest in or to any tract of land in this state for permission to explore, mine, take out and remove ore therefrom; and the word 'person' shall be construed to include individuals, co-partnerships, associations, companies and corporations.

"Succeeding sections relate to reports to the Tax Commission, method of assessment, penalties, date of payment, etc. Section 5 provides: 'A person subletting land for the use of which he receives royalty shall be required to pay taxes only on the difference between the amount of royalty paid by him and the amount received.' And Section 8: "The *situs* of royalty for all purposes of this act shall be in this state; and the tax herein provided for shall be a specific lien from the time the same is due and payable upon all and singular the right, title and interest of the person to whom such royalty is payable, in and to the land for permission to explore,

mine, take out and remove ore on which the royalty is paid.'

"And then speaking with reference to said enactment, the court continued:

> " 'Ultimate construction of Chapter 226 is for the state courts, but, in the absence of that, *we think the enactment may be reasonably interpreted as laying a tax upon interest in mineral lands* from which permission has been given to extract ores upon payment of royalty. The amount of the exaction is determined by reference to the sum actually received *for the use of such interests.*'

"As the tax is laid upon land, neither the owner's residence nor the place fixed for the payment of the royalty is important." (Italics ours.)

See also, State vs. Snyder, (Wyo.), 212 Pac. 578; State vs. Hatcher (Tex.), 281 S. W. 192; Opinions of Attorney General, Vol. 19, page 161; Barnes vs. Keyes, 37 Okla. 6, 127 Pac. 261.

In view of the plain provisions of the statute and the foregoing authorities, we earnestly insist that the tax now under consideration is a direct tax upon the land as such, and is therefore uninforcible as to the petitioners and their assignors; as it is admitted that their lands involved herein were exempt from taxation during the times alleged in their petition. The right to exemption was settled by this court in Choate vs. Trapp, 224 U. S. 665, 56 L. Ed. 941.

(b) The Tax is Illegal Even if Considered as a Tax Upon the Yield or Produce of the Land, Whether (1) Said Mineral Royalties are Attempted to Be Taxed as Such; or (2) Whether They Be Considered as Ordinary Rents and Produce of Said Lands; for it is in Either Event, a Tax Upon the Land.

We believe that all will agree that oil and gas royalties should not be classed as ordinary rents and produce, and that a different rule should apply as to these.

Oil in place is a part of the realty. Barnes vs. Keys, 37 Okla. 6, 127 Pac. 261; Rich vs. Doneghey, 71 Okla. 204, 177 Pac. 86; Strawn vs. Brady, 84 Oklahoma, 66, 202 Pac. 505. And as between the life tenant and the remainderman, the proceeds of the sale of oil and gas go to the remainderman. In Barnes vs. Keys, supra, it is said:

> " * * * * In other words, it is held that the minerals are part of the land itself and that the life tenant has no right to take the minerals any more than he would have the right to sell or dispose of a part of the surface of the land."

Further on in the course of the opinion, it is said:

> " * * * * and it follows that the proceeds of the oil belong to the remainderman, just as the proceeds of the land itself would."

The Supreme Court of West Virginia, in the case of Wilson, et al, vs. Hughes, et al, 28 S. E. 781, 30 L. R. A. 292, held that:

> "Petroleum oil, as it is found in the cavities of the rock, is part of the realty, and embraced in the comprehensive idea which the law attaches to the word 'land'. "

The Supreme Court of Texas, in the case of State of Texas vs. Hatcher, 281 S. W. 192, in an able opinion, holds that:

> 2. "An oil and gas lease is a sale of a portion of the corpus of the land and in the event oil is discovered and produced there is a final and permanent taking of a portion of the land, the stipulated royalty being the purchase price payable as in installments."

Also:

> " * * * * *it seems quite clear to us that the courts*

> *recognize a distinction between minerals and crops taken from annually or oftener. The former is a permanent taking of the corpus of the property. The latter does not in any sense permanently deplete the value of the land."* (Italics ours.)

The Oklahoma Supreme Court in the case of Aldridge vs. Houston Oil Company, et al, 116 Okla. 281, 244 Pac. 782, recognizes the distinction between oil and gas royalties and ordinary produce in the following language:

> " * * * * When production is reached, the fee is impaired and diminished to the extent of the value of the oil or gas which is brought to the surface and reduced to possession. This would not be income, but a conversion of the fee pro tanto, or, as expressed at common law, waste, which is a right prohibited to a life tenant. Rapel vs. Ohio Oil Co., 95 N. E. 225, 176 Ind. 4, Ann. Cas. 1913E, 836; Marshall vs. Mellon, 36 Am. St. Rep. 601; Williamson vs. Jones, 27 S. E. 411, 43 W. Va. 562, 38 L. R. A. 694, 64 Am. St. Rep. 891."

In the case of Gabe E. Parker vs. Tootie Riley, 63 L. Ed. 847, this court, in dealing with the question as to whether oil royalties produced from the homestead of a full-blood Indian who left surviving, a child, born prior to March 4th, 1906, and also one born after that date, should be considered as ordinary rents and income accruing from said land and therefore payable to the heir born subsequent to said last mentioned date, held that the royalties thus received were a part of the real estate and that they therefore belonged to the remainderman, and that the child born after March 4th, 1906, who, under the federal statute, was entitled to the exclusive use and benefit of the homestead, was only entitled to receive the interest derived from the investment of such royalties prior to April 26th, 1931, at which time, the principal should be divided among the heirs of the

decedent. We quote the following excerpt taken from page 850, to-wit:

> " * * * * These minerals were part of the homestead, and the lease was to operate as a sale of them as and when they were extracted. In that sense, the heirs were exchanging a part of the homestead for the money paid as royalties, but no heir was surrendering any right to the others. Thus the rights of all in the royalties were the same as in the homestead. * * * * "

The Supreme Court of the State of Wyoming, in State vs. Snyder, 212 Pac. 758, recognized this distinction in the following language:

> " * * * * *Oil and gas, while in situ, are part of the realty; part of the corpus of the land. When a portion of it is taken away, the proceeds necessarily arise out of the corpus, and it is humanly impossible to change that simple, plain, physical fact. The character of the proceeds can, obviously, at least as between the beneficiaries, in no possible manner be changed by the nature of the documentary authority pursuant to which the oil and gas is taken out of the ground. Documents do not possess the power of an alchemist; neither do they wield a magician's wand. Whether the oil be taken out of the ground pursuant to a license, lease sale, or any other grant, or without any authority whatever, could not in the slightest degree affect the physical fact that it comes from the corpus of the land. If taken and disposed of at all, the effect is clearly a permanent disposition of that much of the corpus, the principal of the land, and irrespective of the authority pursuant to which that is done.* * * * " (Italics ours.)

But without regard to the nature of the income and even if considered as ordinary rents and produce, the tax can not be sustained. This court, in Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429, 39 L. Ed. 759, lays down

the broad principle that a tax upon the income from land is a tax upon the land itself. There, it is said:

> *"If the Constitution had provided that Congress should not levy any tax upon the real estate of any citizen of any state, could it be contended that Congress could put an annual tax for five or any other number of years upon the rent or income of the real estate?* And if, as the Constitution now reads, no unapportioned tax can be imposed upon real estate, can Congress, without apportionment nevertheless *impose taxes upon such real estate under the guise of an annual tax upon its rents or income?*
>
> "As according to the federal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of Coke, that, *'if a man seized of land in fee by his deed granted to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery secundum forman chartae, the whole and itself doth pass. For what is the land but the profits thereof?'* Co. Lit. 54. *And that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity.* 1 Jarm. Wills (5th Ed.) No. 798, and cases cited.
>
> "The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. *Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself* that it belongs to a wholly different class of taxes, such *taxes must be regarded* as falling within the same category *as a tax on real estate eo nomine. The name of the tax is unimportant. The*

real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth and produce of the land. Mr. Justice Patterson observed in Hylton vs. United States, 3 U. S. 3 Dell. 171 (1:556), *'Land independently of its produce, is of no value,'* and certainly had no thought that direct taxes were confined to unproductive land." (Italics ours.)

See also: Thomas vs. Gray, 169 U. S. 264, 42 L. Ed. 740; Gillespie vs. State of Oklahoma, 275 U. S. 501, 66 L .Ed. 338; Kelsay vs. Kelsay Land Co., 64 Okla. 291, 166 Pac. 173; Jaybird Mining Co. vs. Weir, 46 Sup. Ct. Rep. 582; Choctaw O. & G. R. Co. vs. Harrison, 235 U. S. 219, 59 L. Ed. 237; Brown vs. Maryland, 25 U. S. 12; Weston vs. Charleston, 27 U. S. 2 Pet. 449; Dobbins vs. Erie County Commissioners, 41 U. S. 16 Pet. 435; Almy vs. California, 65 U. S. 24, Howard 169; Cook vs. Penn, 97 U. S. 566; Northern Central Ry. Co. vs. Jackson, 74 U. S. 7 Wall. 262; Hylton vs. U. S. 3 U. S. Dall. 171.

The state authorities rely heavily upon the case of Forbes vs. Gracey, 94 U. S. 762, 24 L. Ed. 313, and the Oklahoma Supreme Court cites Elders vs. Wood, 208 U. S. 226; Belk vs. Meager, 104 U. S. 283; Manuel vs. Wulff, 152 U. S. 505; St. Louis Mining & Milling Co. vs. Montana Mining Co., 171 U. S. 650, in support of its decision of the case. We think that these cases are clearly distinguishable from the case at bar. The case of Forbes vs. Gracey, supra, which appears to be in the main reliance of the state, is the only case referred to involving a gross production case, predicated upon the value of the product of the mine. That

case, however, is not analagous to the case at bar. If we were considering the interest of the producer in the oil produced from plaintiffs' tax exempt lands, then we should have a state of facts somewhat similar to those presented in Forbes vs. Gracey, supra. We concede that the state has the power to levy a tax upon the value of the lease, and lessees' portion of the oil and gas produced thereunder, as property in the hands of the lessee. But that is quite different from taxing plaintiffs' portion of said minerals under the conditions alleged in the amended petition. This court lays down the following rule in the third paragraph of the syllabus in Forbes vs. Gracey, supra, to-wit:

> "The Nevada statute which makes a tax on such ore a lien on the mines or mining claims from which the ore is extracted, is not an interference with the right of property of the government in the lands from which the ore is extracted."

The court upholds the Nevada statute which makes a tax on the ore a lien upon the mining claim for the reason that under the Federal statute in regard to mining claims, the title and property rights of the owner of the mine are wholly separate and distinct from the title of the government to the remaining portion of the land, as above stated.

Elders vs. Wood, supra, involves an ad valorem tax upon the mining claim itself, wholly separate and distinct from the government's ownership of the land; no question of federal agency was involved and no property rights of the government was sought to be taxed; and this court simply held that a tax levied upon the property rights of the owner of the mining claim was valid exercise of power by the state.

Belk vs. Meager, supra, involves a contract in ejectment by one claimant against another and no question of taxation was presented, but simply a question of priority of claims.

(c) The Tax, if Enforced Against Petitioners and Their Assignors, Would Deny to Them the Uniformity of Operation of the Tax Laws of the State of Oklahoma, and Would Deny to Them the Equal Protection of the Law.

Section 50, Article 5, of the Oklahoma Constitution, requires that all property except such as therein expressly exempt, shall be subject to taxation, and Section 8, of Article 10, provides, that all property shall be assessed at its fair cash value, and Section 5, Article 10, provides, that all taxes shall be uniform upon the same class of subjects. Therefore, a greater rate of tax can not be levied against the petitioners and their assignors than is levied against the property of other persons of the same classification. It is definitely shown above, we believe, that the tax as to the royalty owner, when generally applied, includes the royalty interest in the land. Therefore, to hold that the tax as to the plaintiffs and their assignors is levied against the royalty oil and gas actually produced from their lands during the taxable year, denies to them the uniformity of application of the tax laws, and denies to them the equal protection of the laws of the state and constitutes the taking of their property without due process of law; all in violation of the constitutional provisions of the state above cited, and the 5th and 14th Amendment to the Constitution of the United States.

In the case of Sioux City Bridge Co. vs. Dakota County, Nebr., 260 U. S. 441, 67 L. Ed. 340, the following rule is laid down in the first paragraph of the syllabus:

> "A bridge company is denied the equal protection of the laws, in violation of the 14th Amendment of the Federal Constitution, by the assessment of its property at full value while the other property in the county is assessed at only fifty-five-one-hundredths of its value."

PART 2

The Tax, as Applied to Petitioners and Their Assignors is Utterly Void for Want of Jurisdiction to Enforce the Same, and Statutes of Procedure, Which Govern in Cases of Suits to Recover Taxes on Account of Error in Assignment, Have no Application.

In this case a part of the tax was paid "at the time and in the manner provided by law"—that is, before delinquency—and a portion of the tax was delinquent at the time the same was paid. So the further question is presented whether in any event plaintiffs can recover that portion of the tax which was paid after delinquency. The state court held that they could not, and petitioners contend that such ruling was erroneous. The case of Ward vs. Love County, 253 U. S. 17, 64 L. Ed. 751, is applicable. There it was said:

> "As the payment was not voluntary, but made under compulsion, no statutory authority was essential to enable or require the county to refund the money. It is a well-settled rule that 'money got through imposition' may be recovered back; and, as this court has said on several occasions, 'the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' Marsh vs. Fulton County, 10 Wall. 676, 684 L. Ed. 1040, 1042; Louisiana vs. Wood, 102 U. S. 294, 298, 299, 26 L. Ed. 153, 155; Chapman vs. Douglas County, 107 U. S. 348, 355, 27 L. Ed. 378, 381, 2 Sup. Ct. Rep. 62. To say that the county could collect these unlawful taxes by coercive means, and not incur any obligation to pay them back, is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course, this would be in contravention of the 14th Amendment, which binds the county as an agency of the state."

The Oklahoma Supreme Court, in Walker, et al vs. Hays, et al, 127 Okla. 123, 260 Pac. 15, held that the provisions of the statute as to payment of taxes under protest and suit to recover the same was not applicable to taxes levied against the improvements placed upon a restricted Indian allotment as the state was without power to enforce the tax. See also: A. T. & S. F. Ry. Co. vs. O'Connor, 223 U. S. 280, 56 L. Ed. 436.

CONCLUSION

In conclusion, we most respectively urge that the tax cannot be inforced as against the petitioners and their assignors in this action for the reason that the statute, when properly construed, and as construed by the Supreme Court of the State of Oklahoma, is a tax not upon the produce of the land, but upon the land itself; and further, that even if the tax be considered as a tax upon the produce and income derived from the land, nevertheless, the tax is invalid, for the reason that the allottees' receipt of royalties is but a conversion of a portion of their real estate into cash and amounts to a sale of a portion thereof, or interest therein, and such tax is therefore a tax upon the land; but even if considered as ordinary rents and income, still a tax thereon is a tax upon the land itself and therefore uninforcable under the rule announced in Pollock vs. Farmers' Loan & Trust Co., and other cases, supra.

And we further most earnestly insist that the state is without jurisdiction or authority to inforce the tax against petitioners and their assignors as to their royalty interests during the period of time involved in this action, and that statutes of procedure of the State of Oklahoma which govern in cases to recover a tax by reason of some mere irregularity in the assessment can have no application here, where the tax is absolutely void.

Most respectfully submitted,

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APPENDIX

FEDERAL STATUTES

A portion of Section 29 of the Act of Congress of June 28, 1898, ratified August 24, 1898, commonly known as the Atoka Agreement (30 Stat. 495), is as follows:

"All the lands allotted shall be non-taxable while the title remains in the original allottee, but not to exceed twenty-one years from date of the patent."

STATE STATUTES

Section 9814, C. O. S. 1921:

"Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall, within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D., 1916, and of each quarter-annual period thereafter, expiring respectively, on the last day of June, September and March of each year, file with the State Auditor a statement under oath, on forms prescribed by him, showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per-centum of the gross value of the production of petroleum

or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty interest within the time and in the manner provided by this act.

"The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest.

"The State Auditor shall have power to require any such person, firm, corporation or association engaged in mining or the production of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil and natural gas or owner of any royalty interest therein to furnish any additional information by him deemed to be necessary for the purpose of correctly computing the amount of said tax and to examine the books, records, and files of such person, firm, corporation or association and shall have power to examine witnesses, and if any witness shall fail or refuse to appear and testify at the summons or requests of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear and testify or to produce any book, record or file to the District Court of this state having jurisdiction of the party, and said court shall thereupon issue a summons to said party to appear and give such evidence and produce such books, records and files as may be required, and upon failing to do so, the offending party shall be punished as provided by law in case of contempt.

"The State Auditor shall have power to ascertain and determine whether or not any return herein required is a true and correct return of the gross products and of the value thereof of such person, firm, corporation or association engaged in the mining or production of asphalt and ores bearing minerals aforesaid and of petroleum or other crude oil or mineral oil and of natural gas, and if any per-

son, firm, corporation or association has made an untrue or incorrect return of the gross production or value thereof, as hereinbefore required, or has failed or refused to make such return, the said State Auditor shall ascertain the correct amount of either, and compute said tax.

"The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil or for natural gas upon the mining rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in the paragraph mentioned or described; but any interest in the land other than that herein enumerated and oil in storage, asphalt, and ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

"The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas or mineral lease, or of

the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced, and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power, and it shall be its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said board to said court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered."

Section 9971, C. O. S. 1921:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the laws provide no appeal, the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer to hold such taxes separate and apart from all other taxes collected by him, for a period of thirty days, and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein, if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivision of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting

officer shall pay to such person the excess and shall take his receipt therefor."

Section 9973, C. O. S. 1921:

"None of the acts herein required to be done shall be enjoined by a court of equity, but any person aggrieved in any matter of collection, assessment or levy of any tax herein provided for shall pay the tax at the time and in the manner provided by law, except as stated in Section 2, Article 2-B, hereof, and at the time of payment shall file a written statement with the State Auditor, under oath, as provided in Sections 10-11, Article 2-B, hereof, fully setting forth his complaint. The Auditor shall retain the payment as a special deposit to await the final decision on said complaint. And thereupon the same right of hearing and review shall be had upon said complaint as provided for herein in Sections 10-11 of Article 2-B hereof."